No. 6941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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NGAI KWAN YING,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This appeal is from an order of the District Court for the Northern District of California, denying appellant's petition for a writ of habeas corpus (Tr. 59).

FACTS OF THE CASE.

Appellant is a Chinese girl, seventeen years old (Tr. 27). She claims to be the wife by a marriage contracted in China on April 6, 1931 of Kwan Tow, a

Chinese merchant residing in the United States. Her application for admission to the United States was denied by a Board of Special Inquiry for failure to establish that claim satisfactorily (Tr. 16 to 26, inclusive). That decision was affirmed on appeal by the Secretary of Labor (Tr. 27 to 30, inclusive).

Testimony before the Board was given by appellant, by her alleged husband, and by one Au Yeung Shee.

The excluding decision is based primarily upon the following points, among others:

1. That the alleged husband is discredited as a witness because of his fraudulent attempt in 1923 to bring in as his mother a prostitute who had been deported, and as his sister a seventeen year old impostor.

2. That Au Yeung Shee is discredited as a witness because of having given false testimony when she herself was applying for admission in 1931.

3. That appellant and her alleged husband contradict each other regarding the single visit which it is claimed the latter made to appellant's home village in China two months before the hearing.

4. That the testimony is in conflict regarding an alleged meeting between appellant and Au Yeung Shee in Canton City three months before the hearing, particularly regarding whether Au Yeung Shee was then accompanied by her children.

ARGUMENT.

1. THE ADMINISTRATIVE DECISION WAS NEITHER ARBITRARY NOR UNFAIR.

This is another of the innumerable cases which burden the calendars of this Court at every term, involving merely the weight of the evidence before the administrative tribunals and the credibility of the witnesses heard by them.

Of course, the question here is not whether the executive decision is right or wrong, nor whether the Court with the same facts before it might reach a different conclusion, but simply whether the administrative officers acted arbitrarily or unfairly.

> *Louie Lung Gooey v. Nagle* (C. C. A. 9), 49 Fed. (2d) 1016.

(a) The credibility of the alleged husband.

Certainly there was ample evidence before the Board that in 1923 appellant's alleged husband gave false testimony (reiterated by him in connection with the present application) when he testified that the woman and girl then applying for admission were his mother and sister respectively and that the woman was not the person who was deported as a prostitute in 1918 and had never been in the United States before (Tr. 32 to 34, inclusive).

The woman admitted that she is not Kwan Tow's mother, that she is the woman who was deported as a

prostitute in 1918, and that the young girl applying for admission with her was not her daughter (Tr. 41 and 42). Her testimony was fully corroborated by Miss Katherine R. Maurer, Deaconess of the Methodist-Episcopal Church, 655 Stockton St., San Francisco, who identified her as the prostitute who had been deported and who pending deportation had been paroled to the Methodist-Episcopal Home (Tr. 39 to 41, inclusive). The young Chinese girl who appellant's alleged husband claims is his sister testified that she did not know him and had never seen him before (Tr. 38 and 39).

We might also mention that while appellant's alleged husband testified in connection with the present application that his mother died February 12, 1931 and that his sister was married on November 14, 1926 and shortly thereafter went to the Straits Settlements (Tr. 37), his brother testified as recently as March 11, 1931, that both his mother and his sister were living in the home village in China, and that the sister had never been married (Tr. 43).

On such a record, the immigration authorities were certainly not arbitrary in declining to credit the testimony of the alleged husband in connection with the present application.

Quan Wing Seung v. Nagle, (C. C. A. 9), 41 Fed. (2d) 58;

U. S. ex rel Fong Lung Sing v. Day (C. C. A. 2), 37 Fed. (2d) 36;

U. S. ex rel Soy Sing v. Chinese Inspector (C. C. A. 2), 47 Fed. (2d) 181, at 183 and 184.

Appellant attempts to distinguish the first two cases just cited on the ground that in those cases the previous false testimony was given at hearings involving substantially the same issue as that involved in the later application.

There is no such distinction. In the *Quan Wing Seung* case the alleged father had previously attempted to bring in a son born in 1906, although he had testified in 1911 that he had no children. This did not directly affect the validity of Quan Wing Seung's claim because, according to the record, he was born after 1911. Hence, the previous false testimony in that case did not touch the particular issue involved in the application of Quan Wing Seung. Nevertheless, this Court said:

> "The record is replete with alleged discrepancies *but in view of the false testimony given by the father in an effort to secure the admission of an alleged son* we cannot say that a fair hearing was denied because the immigration authorities did not believe his testimony in the present instance."

Likewise, in the *Fong Lung Sing* case, supra, the Court, in discussing the attempted fraud shown in the prior records, said:

> "It is quite true that these do not directly affect the paternity of the applicant who as we have said was not born in 1911 when the relator testified * * *."

The Court went on to say that the Board might properly have concluded that the alleged father and alleged brother had once tried to run in an impostor and therefore that the applicant's claim was doubtful.

Likewise, in the *Soy Sing* case, supra, it is sufficient to quote from the Court's opinion:

> "At both hearings, however, he testified that he was the father of the applicant, and none of the contradictory evidence he gave directly indicates the contrary; yet it does indicate his general untruthfulness, his willingness to testify falsely, and leaves his credibility so impaired that to hold the Board of Inquiry unfair in failing to rely upon it would be an unwarranted invasion of the right of the examiners to be exclusive judges of the credibility of the witnesses who testify before them, and, having reasonable grounds for their conclusion, to decide that this witness was unworthy of belief. This left the testimony of the applicant virtually unsupported, and it is impossible to say that the Board was unfair in holding it to be less than enough. See Ex parte Jew You On (D. C.) 16 F. (2d) 153. It should be remembered that this appeal is not a trial de novo."

It is obvious therefore that appellant's attempted distinction is without substance.

The character and credibility of the witnesses were matters for the consideration of the immigration authorities and their conclusions cannot be disturbed.

> *Wong Shee v. Nagle* (C. C. A. 9), 7 Fed. (2d) 612;

Chin Shee v. White (C. C. A. 9), 273 Fed. 801, at 806.

We might add here that in the case at bar proof of the vital fact that the alleged husband's previous marriage had terminated (*Ng Suey Hi v. Weedin,* 21 Fed. (2d) 801) depends solely upon his own testimony that his first wife died in China on October 26, 1925 (Tr. 51). Since he testified falsely regarding other family matters, viz., regarding his alleged mother and sister, we submit that the immigration authorities were not compelled to believe his testimony that his first wife had died.

Weedin v. Ng Bin Fong (C. C. A. 9), 24 Fed. (2d) 821.

The burden of appellant's complaint is that the testimony discrediting the veracity of the alleged husband was given in connection with other applications for admission to which she was not a party.

That situation likewise existed in the cases which we have cited above.

Nothing is better settled than that the immigration officers in these administrative proceedings are not bound by judicial standards, nor by judicial rules of evidence.

Bilokumsky v. Tod, 263 U. S. 149, at page 157;
Ghiggeri v. Nagle (C. C. A. 9), 19 Fed. (2d) 875;
U. S. ex rel. Smith v. Curran (C. C. A. 2), 12 Fed. (2d) 636;

Ng Mon Tong v. Weedin (C. C. A. 9), 43 Fed. (2d) 718;

Ex parte Shigenari Mayemura (C. C. A. 9), 53 Fed. (2d) 621.

It is equally well settled that the immigration officers may at all times consider the contents of their official records.

Tang Tun v. Edsell, 223 U. S. 673, at 681;

Chin Shee v. White (C. C. A. 9), 273 Fed. 801, at 804;

Moy Yoke Shue v. Johnson, 290 Fed. 621, at 623.

In

Wong Foo Gwong v. Carr, 50 Fed. (2d) 360,

this Court said:

> "It is a well established rule in cases of this kind that it was not improper for the immigration officials to refer to their past records in order to determine the weight to be given to the testimony of the alleged father * * *."

In

Tang Tun v. Edsell, supra,

the immigration authorities considered records relating to the admisssion of other Chinese entirely unconnected with the applicant.

In

Moy Yoke Shue v. Johnson, supra,

testimony was considered which had been given by an acquaintance of the applicant's alleged father in

connection with the application of the son of the acquaintance.

Likewise, in

Wong Heung ex rel. Wong Yut Din v. Johnson (C. C. A. 1), 21 Fed. (2d) 826,

it was held that the Board properly considered testimony of an alleged uncle and two alleged nephews, given in an earlier proceeding not involving the applicant.

None of the cases which appellant cites as authority for his contention is in point. All those cases were judicial proceedings, except those cited at the foot of page 15 of appellant's brief, in which cases it was shown that the statements relied upon as contradicting the witnesses were due to misunderstanding or mistake, and except

Gung You v. Nagle, 34 Fed. (2d) 848,

in which there was no evidence whatsoever that any of the witnesses had given false testimony at any time. This is true also of the cases cited at pages 22 and 36 of appellant's brief.

There was no inconsistency in conceding that the alleged husband is the son of Kwan Chong and nevertheless holding that he testified falsely regarding the two women who applied for entry in 1923. Kwan Chong has never denied that the alleged husband is his son, whereas the woman and girl who applied in 1923 denied that they are his mother and sister respectively, and his testimony in that respect is also refuted by the testimony of Miss Maurer.

Obviously, the case of

Wong Dock v. Nagle, 41 Fed. (2d) 476,

wherein the immigration authorities held on two occasions that the alleged father was lawfully married, and on another occasion on the same evidence that he was not, bears no similarity to the case at bar.

We submit that the immigration authorities were neither arbitrary nor unfair in concluding that appellant's alleged husband is unworthy of belief.

(b) The credibility of Au Yeung Shee.

The witness Au Yeung Shee is alleged to have attended one of the wedding banquets held the day after the alleged marriage of appellant April 6, 1931 (Tr. 5, 20, 56), and to have also seen appellant and her alleged husband in Canton City on one occasion in October, 1931 (Tr. 11, 56, 57). Her testimony is not at all conclusive upon the issue and her credibility is seriously impaired.

Appellant, at page 27 of her brief, states that the testimony "leaves considerable doubt" that this witness did give false testimony when she herself applied for admission in November, 1931.

Of course, even a considerable doubt would not justify interference with the executive decision. Moreover, we see no doubt at all on this point. The readmission of the witness in November, 1931, depended upon a showing that she had property or debts due her in the sum of $1000, or certain relatives in the

United States (8 U. S. C. A., Sec. 276). She originally based her application on an alleged bank deposit in the statutory sum (Tr. 44). She repeatedly denied having signed a note to the bank with the account as collateral for a loan (Tr. 44, 45). Her husband, however, admitted that $800.00 had been borrowed from the bank, that she pledged her bank account as security for this loan, and that she signed a note for $800.00 in favor of the bank (Tr. 47 to 50, inclusive). Au Yeung Shee then finally admitted that she and her husband had gone to the bank, and that she had signed this note (Tr. 45 and 46).

Appellant claims that Au Yeung Shee was finally admitted into the United States by the Secretary of Labor on appeal and, hence that the false testimony given by Au Yeung Shee must be considered as immaterial.

Of course, the fact that Au Yeung Shee may have had another statutory exemption entitling her to enter, and that the false testimony may have been unnecessary to accomplish the end in view, does not render the false testimony immaterial.

> 48 *C. J.*, page 836;
> *State v. Berliawsky,* 106 Me. 506, 76 A. 938;
> *Gordon v. State,* 158 Wis. 32, 34, 148 N. W. 998.

Moreover, there are other factors detracting from the credibility of Au Yeung Shee.

Au Yeung Shee's testimony is that although she was about eight months pregnant at the time of the wed-

ding banquet she walked to and from her home village (a distance of about four miles each way) to attend that banquet (Tr. 10, 20). Regarding her other asserted meeting with appellant in Canton City three months before the hearing, she and appellant are in flat conflict as to whether she had her three children with her or only one of them (Tr. 56, 57, 58). There is also contradiction between this witness and appellant's alleged husband as to whether the latter accompanied her from the hotel to the boat upon which she left Canton City (Tr. 21 and 22), and likewise disagreement between them regarding whether or not there are kitchens in the ancestral hall where the alleged wedding banquet is said to have been held (Tr. 22).

We think that this shows considerable disagreement in view of the fact that the testimony of this witness is limited to only the two meetings, both within a few months of the examination.

Regarding the fairness of the action of the immigration authorities in viewing the credibility of this witness with doubt, the authorities we have cited above regarding the credibility of appellant's alleged husband are equally applicable here.

(c) The appellant's testimony.

There is a serious conflict between appellant and her alleged husband regarding the single visit which it is asserted the latter made to the home village of appellant. Both parties testify that such a visit occurred on November 14, 1931, two months before the hearing.

The alleged husband testified that he did not go with appellant, that each went alone, that when he arrived she was already there, and that they did not come back together but that he came home first (Tr. 53). Appellant testified that they walked to her home village together, that they left home together and arrived at her parents' home together, and that they walked back home together (Tr. 54).

The examination of each on this point could not possibly be more definite. The testimony of each is positive and unambiguous. It is significant that each party remembers the exact date on which the visit is alleged to have occurred and hence there could be no failure of recollection as to whether they went together or separately. The distance is said to be about three miles each way (Tr. 7) and it is claimed that this was the only occasion upon which the alleged husband visited the parents of appellant. Such an occasion should be impressed upon the memory of both.

> *Wong Hai Sing v. Nagle* (C. C. A. 9), 47 Fed. (2d) 1021, at page 1023, column 1.

In any event the testimony of the applicant herself would be insufficient to impel a finding of the claimed relationship.

> *Weedin v. Ng Bin Fong* (C. C. A. 9) 24 Fed. (2d) 821, supra;
>
> *Wong Fat Shuen v. Nagle* (C. C. A. 9), 7 Fed. (2d) 611;
>
> *Tillinghast v. Flynn,* 38 Fed. (2d) 5;

U. S. ex rel Fong Lung Sing v. Day, supra;
U. S. ex rel Soy Sing v. Chinese Inspector, supra.

In

Tang Tun v. Edsell, supra

the Supreme Court said:

> "There remained the testimony of Tang Tun himself, but this, with all the other evidence in the case, was for the consideration of the officers to whom Congress had confided the matter for final decision."

We know of no case holding that the immigration authorities are compelled as a matter of law to accept as sufficient proof the testimony of the applicant alone even if there are no contradictions.

All the cases cited by appellant either relate to judicial proceedings and not habeas corpus proceedings, or do not touch the point at all.

Appellant refers to a "three generation paper" which is also alluded to by her as a "marriage certificate", an easily manufactured document, like the "pedigree" of a Belgian hare.

There is nothing official about such a document (Tr. 25 and 26) even if its authenticity were established. Similar papers were presented by the impostor whom appellant's alleged husband attempted to pass off as his mother in 1923 (Tr. 26). Similar papers were also presented in the case of

Lee Shee v. Nagle (C. C. A. 9), 22 Fed. (2d) 107,

wherein the judgment denying the petition for writ of habeas corpus was affirmed.

The issuance to appellant by the American Consular officer of a visa to enable her to proceed to the United States and apply for admission is entirely immaterial here. The American Consular officers are without authority to determine the right to enter the United States.

8 U. S. C. A. Sec. 202 (g);
Wong Ock Jee v. Weedin (C. C. A. 9), 24 Fed. (2d) 962;
Takeyo Koyama v. Burnett (C. C. A. 9), 8 Fed. (2d) 940;
Ex parte Jeu Haw Bong, 29 Fed. (2d) 793;
Keating ex rel Mello et al. v. Tillinghast, 24 Fed. (2d) 105;
U. S. ex rel Alexandrovich v. Commissioner of Immigration, 13 Fed. (2d) 943.

In

U. S. ex rel Schachter v. Curran, 4 Fed. (2d) 356,

cited by appellant, the record showed that the documents establishing the relator's non-quota status had been taken up and retained by the American Consul abroad who gave him the visa. In that case said documents were indispensable to a determination of the issue.

2. THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT OF THE EVIDENCE WERE EXCLUSIVELY FOR THE DETERMINATION OF THE IMMIGRATION AUTHORITIES.

In

Tulsidas v. Insular Collector of Customs, 262 U. S. 258,

the Supreme Court has pointed out that the law, in administration of its policy, has appointed officers to determine the merits of these cases "on practical considerations", and that the Courts should

> "leave the administration of the law where the law intends it should be left; to the attention of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion."

The Court also pointed out at page 265 that the judgments of those officers is based on their knowledge of the conditions obtaining, on their contact with the applicant, and on their estimate of the appellant's claims, and went on to say:

> "And necessarily, we should not view the spoken word, nor even the partnership agreement produced in support of the spoken word, separate from that contact and that estimate."

Appellant has rested all her principal contentions upon authorities pertaining to judicial proceedings and judicial standards. This case was an administrative hearing freed from those restrictions.

We submit that the decision of the Court below denying the petition for writ of habeas corpus should be affirmed.

Respectfully submitted,

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